IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1899.

NO. 384.

CHARLES L. MAXWELL,
Plaintiff in Error,

vs.

GEORGE M. DOW, as Warden of the Utah State Prison,
Defendant in Error.

In Error to the Supreme Court of Utah.

PLAINTIFF'S BRIEF.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error.

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PLAINTIFF'S BRIEF.

In this case, the plaintiff filed in the Supreme Court of Utah his petition for a writ of *habeas corpus*, and as grounds for the same alleged the following facts:

1. That he is a citizen of the United States.

2. That in the month of June, 1898, at Provo City, Utah County, State of Utah, in the Fourth

Judicial District Court of said State, the prosecuting attorney of said county, made and caused to be filed an information whereby the plaintiff was charged, under the name of John Carter, with the crime of robbery, alleged to have been committed in Utah County, Utah, in the month of May, 1898.

3. That he was arraigned in said court on said information and entered a plea of "not guilty."

4. That in the month of September, 1898, he was tried in said court on said charge by a pretended jury of only eight persons, by them found guilty, and upon such pretended verdict, sentenced to be confined in the Utah State prison for eighteen years, and in pursuance and execution of said judgment, was and still is imprisoned in said State Prison, by George. N. Dow, as Warden thereof.

Plaintiff in error claimed in that proceeding that his imprisonment on the record as set out was illegal and void for the following reasons:

1. He claimed that holding him to answer for the crime of robbery, except on a presentment or indictment of a grand jury, abridged his privileges and immunities as a citizen of the United States as guaranteed by Article V. of the Amendments to the Constitution of the United States, which pro-

vides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, etc.," and section one of Article XIV of the Amendments to the Constitution of the United States, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

2. He claimed that trying him by a pretended jury of only eight persons abridges his privileges and immunities as a citizen of the United States as guaranteed by Article VI. of the Amendments to the Constitution of the United States, which provides as follows:

"In all criminal prosecutions the Accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, etc."

And Section 1 of Article XIV of the amendments to the Constitution of the United States, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

3. He claimed that trying him by a pretended jury of only eight persons and upon a verdict of guilty by said persons, imprisoning him in the State prison, is depriving him of his liberty without due process of law, and is in voilation of his rights as guaranteed by section one of Article XIV of the Amendments to the Constitution of the United States, which provides:

"No state shall deprive any person of life, liberty or property without due process of law."

4. He claimed, that section ten of Article one, and section thirteen of Article one of the Constitution of the State of Utah, compelling him to be tried for a felony, except by a jury composed of twelve persons, and holding him to answer for a charge of felony, to-wit: robbery, except on a presentment or indictment of a grand jury, abridge his privileges and immunities as a citizen of the United States, and said section ten, compelling him to be tried by only eight persons instead of a jury, deprives him of his liberty without due process of law, and said sections are in contravention of section one of Article XIV of the Amendments to the Constitution of the United States, which provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law,"

and are therefore void.

All the facts set out in the petition were admitted by the defendant, and the Supreme Court of Utah, on the first day of June, 1899, rendered its judgment in the cause, overruling each and every one of the petitioner's contentions, and denied his prayer for release.

It is to review that judgment, that he has brought the case here on Writ of Error.

It would be useless perhaps for us to attempt to state to the court in plainer language than that used above, the exact contention made by the plaintiff in error. It is apparent, that he claims the right to be released from imprisonment, because, he says, he is imprisoned in violation of the rights, privileges, and immunities guaranteed to him by the Constitution of the United States.

In 1892, a wild and untamed spirit of innovation in respect to juries took possession of the legislature of the Territory of Utah, and the same

frenzy invaded the sacred precincts of the Territorial Supreme Court. They held that a verdict rendered by nine out of twelve persons sitting as a jury was valid. That opinion lasted and astonished every one learned in the law, until the Supreme Court of the United States had an opportunity of wiping it out.

When the Territory came to frame a constitution, upon which to be admitted into the Union as a State, it did not forget that its first step towards this heresy regarding juries had been rebuked, and took occasion to plant the new seed so deep that it thought it could not be washed or blown out of the soil. They therefore put into Article one of the State Constitution the following:

"Sec. 10. (Trial by jury.) In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

Under this article of the Constitution, a number of persons were tried by only eight jurors for offenses alleged to have been committed before the Constitution was adopted. These men all ob-

jected to being so tried, and one of them appealed to the Supreme Court of the State, where he was told in a very elaborate opinion:

State vs. Bates, 14 *Utah*, 293.

That it was very clear that the Constitution and laws of Utah, providing for a trial in cases of felony by eight persons sitting as a jury, applied to cases arising before the Constitution went into effect. Consequently Mr. Bates was shut up in the penitentiary. Thomson's case was disposed of by a reference to the opinion of the Court in the Bates case.

State vs. Thompson, 15 *Utah* 488.

In the case of *The State vs. Hart*, 57 *Pac. Rep.* 415. The same court says the opposite view is just as clear as anything can be.

The fact that the learned Supreme Court of Utah has been in error in every decision that it has ever made relative to juries, unless it be the last named case, that has never been reviewed, encourages the plaintiff in error to be dissatisfied with the decision in his case. By a long line of decisions it became the settled and accepted view of the law, that the first eight Articles of Amendments to the Constitution of the United States applied only as limitations on the powers of Congress.

So that prior to the adoption of the Fourteenth Article of Amendments, there was no reason, so far as the Federal Constitution was concerned, why one accused of a felony, might not be tried even without a jury in a state court.

The plaintiff in this case contends, that by the Fourteenth Amendment, all the privileges and immunities guaranteed to citizens of the United States by the Fifth and Sixth Amendments, as against any action by the Federal Government, are protected from invasion by any state.

The first eight Articles of Amendments seem to have been intended to be and to have been accepted as being a Bill of Rights, intended as an everlasting bulwark for the people against any effort of the national government to encroach upon the fundamental liberties of the people. If these rights, privileges, and immunities, did not pertain to the people as citizens of the United States, it is difficult to see in what relation they did belong to them. By this Bill of Rights, Article V, no person could be held to answer for a capital or otherwise infamous crime, unless upon a presentment or indictment of a grand jury. By the Sixth Article of this same Bill of Rights. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial *jury*

of the state and district wherein the crime shall have been committed. These privileges and immunities certainly are spoken of in relation to *Citizens* of the United States. Who else would be likely to be held to answer for criminal offenses? Who else than citizens would be likely to be tried in any court? Surely it will not be claimed that these amendments were made specially for the protection of foreigners, many of whom never heard of a jury trial, and would have no idea what it meant if they did. These then must have been privileges and immunities guaranteed to citizens of the United States.

Prior to the adoption of the Fourteenth Amendment, there was no Constitutional definition of citizenship.

The Bill of Rights comprised in the first eight amendments had been approved, and were thought good enough to be placed beyond the reach of the several states. That security was provided in the Fourteenth Amendment.

The attention of the Court is respectfully invited to the history of this Fourteenth Amendment, as it was presented before the United States Senate in Committee of the Whole, as reported by the joint Committee of the Senate and House.

An account of the transaction may be found in the Congressional Globe, 1st. Session of 39th Congress part 3. pp. 2765–6, where, in discussing it on behalf of the Committee, of which he was a member, after referring to the privileges and immunities spoken of in the second section of the Fourth Article of the Constitution, Senator Howard says:

"To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight Amendments to the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owners; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishment.

"Now, Sir, here is a mass of privileges, immunities and rights, some of them secured by the second section of the Fourth Article of the Consti-

tution, which I have recited, some by the first Eight Amendents of the Constitution, and it is a fact well worthy of attention that the course of decisions of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States, and as a party to their courts. They do not operate in the slightest degree, as a restraint or prohibition upon state legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation, is not a restriction upon state legislation, but applies only to the legislation of Congress.

"Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course, do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply, as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this Amendment is, therefore, to restrain the power of the States, and compel them at all times to respect these great fundamental guarantees. * * * *

It will, if adopted by the states, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges, which pertain to citizens of the United States, and to all persons, who may happen to be within their jurisdiction."

Of course it is not contended that the language of an advocate of a measure in the legislative body enacting the law is to be taken as absolutely conclusive upon the question of the intent of the legislature, still, the reasons assigned by Senator Howard in the foregoing language clearly show the evils sought to be remedied, and that this very Amendment to the Constitution was designed by its framers to remedy the defect in the Bill of Rights, as it appeared in the first eight Amendments to the Constitution of the United. He sets out clearly and forcibly, that the guaranties and protections contained in those Amendments have been considered by the Courts to be limitations upon the Federal Government alone, and as affording no protection against the action of state legislatures, and asks that the Fourteenth Amendment be adopted so as to prevent the States from encroaching upon those fundamental rights.

If anything were needed to demonstrate the necessity of such a safe-guard, we submit that the

actions of the Utah Constitutional Convention and the Supreme Court of Utah have supplied the "long felt want."

Without being able to find any decision by this Court directly upon this question, we have found what seem to us to be some very forceful arguments in favor of our position, in two dissenting opinions in the case of O'Neil vs. Vermont, 144 U. S. 323. This case appears to have been brought to this Court upon a writ of error to the State Supreme Court, and the writ was dismissed for the want of jurisdiction, the Court holding that no Federal question had been properly presented by the record. The Court therefore expressed no opinion upon the merits of the case. The late Mr. Justice Field in a dissenting opinion said, page 360 *et. seq.*:

"The Eighth Amendment of the Constitution of the United States, relating to punishments of this kind, was formerly held to be directed only against the authorities of the United States, and as not applicable to the States. Such was undoubtedly the case previous to the Fourteenth Amendment, and such must be its limitation now, unless exemption from such punishment is one of the privileges or immunities of citizens of the United States, which can be enforced under the clause, declaring that no state shall make or enforce any law which shall abridge those privileges

or immunities. In *Slaughter House* cases, 16 Wall. 36, it was held that the inhibition of that Amendment was against abridging the privileges or immunities of citizens of the United States as distinguished from privileges and immunities of citizens of the states. Assuming such to be the case, the question arises: What are the privileges and immunities of a citizen of the United States which are thus protected? These terms are not idle words to be treated as meaningless and the inhibition of their abridgment as ineffectual for any purpose, as some would seem to think. They are of momentous import and their inhibition is a great guaranty to the citizens of the United States of those privileges and immunities against any possible state invasion. It may be difficult to define the terms so as to cover all the privileges and immunities of citizens of the United States but after much reflection, I think the definition given at one time before this Court, by a distinguished advocate—Mr. John Randolph Tucker, of Virginia—is correct, that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the Constitution of the United States. This definition is supported by reference to the history of the first ten Amendments to the Constitution, and of the Amendments which followed the late civil war. The adoption of the Constitution, as is well known, encountered great hostility from a large class, who dreaded a central government as one which would embarrass the states in the administration of their affairs. They contended that the powers granted to the proposed government were not sufficiently guarded, and might be used to en-

croach upon the liberties of the people. In the conventions of some of the states which ratified the Constitution a desire was expressed for amendments declaratory of the rights of the people and restriction of the powers of the new government in order, as stated at the time, to prevent misconception or abuse of its powers. The desire thus expressed subsequently led to the adoption of the first ten Amendments. Some of these contain specific restrictions upon Congress, as that it shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. Some of them impliedly restrict the powers of Congress in prescribing or construing particular modes of procedure, such as require a presentment or an indictment of a grand jury for the trial of a capital or otherwise infamous crime, and the one that provides, that in suits at common law, where the value involved exceeds twenty dollars, the right of trial by jury shall be preserved. Some of them are declaratory of certain rights of the people which cannot be violated, as their right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; that no one shall be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself; that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; and to be informed of the

nature and cause of the accusation and to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and that excessive bail shall not be required, nor cruel and unusual punishments inflicted.

"The rights thus recognized and declared are rights of citizens of the United States under their Constitution which could not be violated by Federal Authority. But when the late civil war closed, and slavery was abolished by the Thirteenth Amendment, there was legislation in the former slave-holding states inconsistent with these rights, and a general apprehension arose in a portion of the country—whether justified or not is immaterial—that this legislation would still be enforced and the rights of the freedmen would not be respected. The Fourteenth Amendment followed, which declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. The freedmen thus become citizens of the United States, and entitled in the future to all the privileges and immunities of such citizens. But owing to previous legislation many of these privileges and immunities, if that legislation was allowed to stand, would be abridged; therefore in the same Amendment by which they were made citizens, it was ordained that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' thus nullifying existing legislation of that character, and prohibiting its enactment in the future.

"While, therefore, the ten Amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruitions in such limitations are applicable only to the Federal Government and not to the states, yet, so far as they declare or recognize the rights of the persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon State power by ordaining that no State shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both State and Federal action. The State cannot apply to him any more than the United States the torture, the rack or thumb-screw, or any cruel and unusual punishment, or any more than it can deny to him security in his house, papers and effects against unreasonable searches and seizures, or compel him to be a witness against himself in a criminal prosecution. These rights as those of citizens of the United States, find their recognition and guaranty against Federal action in the Constitution of the United States, and against state action in the Fourteenth Amendment. The inhibition by that amendment is not the less valuable and effective because of the prior and existing inhibition against such action in the Constitutions of the several states. The amendment only gives additional security to the rights of the citizen. It was natural that it should forbid the abridgment by any state of privileges and immunities which the Constitution recognized and guaranteed

as rights of citizens of the United States. A similar additional guaranty of private rights is found in other instances. An Inhibition is contained in the several State Constitutions against their legislatures passing a Bill of Attainder or an *ex post facto* law, and yet a like inhibition against State action is embodied in the Constitution of the United States."

The last observation is illustrated by the Constitution of Utah, which provides, Section One, Article Eighteen:

"No bill of attainder, expost facto law, or law impairing the obligation of contracts shall be passed."

And yet, the Supreme Court of the State upheld the validity of a law requiring men to be tried by eight jurors for felonies alleged to have been committed under Territorial Government, when no such trial could be had except by twelve jurors. The trouble with them is, they do not seem to know what an *ex post facto* law is, when they see it.

Coming back to the O'Neil case, we wish to call attention to the language used by Mr. Justice Harlan in a dissenting opinion in which Mr. Justice Brewer concurred. He said at page 370:

"I fully concur with Mr. Justice Field, that since the adoption of the Fourteenth Amendment,

not one of the fundamental rights of life, liberty, or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a state in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution. They were deemed so vital to the safety and security of the people, that the absence from the Constitution, adopted by the Convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of States. The Constitution was ratified in the belief, and only because of the belief encouraged by its leading advocates, that, immediately upon the organization of the government of the Union, Articles of amendment would be submitted to the people, recognizing those essential rights of life, liberty, and property, which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country. Among those rights is immunity from cruel and unusual punishments, secured by the Eighth Amendment against Federal action, and by the Fourteenth Amendment against denial or abridgment by the states. A judgment, therefore, of a State Court even if rendered pursuant to a statute, inflicting or allowing the infliction of a cruel and unusual punishment is inconsistent with the Supreme law of the land."

The plaintiff respectfully submits that his contention is not inconsistent with the decision of this court in the case of Hurtado vs. California 110 U. S. 516, so far as his objection to the validity

of the procedure against him by information is concerned.

As we understand that case, the only point raised by Hurtado was, that, trying him upon an information was not *due process of law*, and the court held that his contention was not good. He never claimed immunity under the Fifth and Fourteenth Amendments of the Constitution of the United States. In this case we say, that the plaintiff has been denied the privileges and immunities guaranteed him by both the Fifth and Sixth Amendments as enlarged by the Fourteenth.

It seems clear, that if the State has the power to reduce the number of jurors in cases of felony from twelve to eight it has the power to abolish jury trial altogether. The jury is not a stick to be whittled away little by little, till none remains.

We have searched in vain in the Constitution and statutes of the United States to find any definition for the term "jury." Everybody in the United States, outside of Utah, seems to know what a jury is, while here we do not seem to know, nor to have the ability to learn.

Each lesson we get in that direction costs some victim a weary wait in the penitentiary, be-

sides all the money he has. The learned Supreme Court of Utah say, in their opinion in this case, in the tenth line from the bottom of page 9 of the printed record:

> The system of twelve jurors in criminal cases, not capital, and in civil cases has been discarded in many states and a less number provided, with the right in civil cases to a two-thirds majority verdict, and these changes have been sustained by decisions of courts of the highest authority.

This statement is absolute, but we must confess our inability to locate any of these same innovations. We have heard it rumored that in Louisiana some such change has been made, but if so it is in a later edition of the State Constitution than we have been able to procure. We shall believe this story when the authorities are cited and verified. We believe that no state in the Union except Utah has attempted to deprive persons charged with a felony of jury trial. By the tenth section of Article One of the Constitution of Utah, it is only in *capital* cases, that *trial by jury is to remain inviolate.* If the state be permitted to reduce the number of jurymen from twelve to eight, why should it not be permitted to reduce that eight to three, and finally to do away with all pretence of jury trial? Unless the individual can find protection in the Sixth and Fourteenth Amendments to

the Federal Constitution, what is there to hinder Utah from trying men charged with capital offenses, before a Justice of the Peace or the town Sexton? These amendments either afford protection or they afford no protection. They either preserve the right of trial by jury—such a jury as has always been recognized at the Common Law, —or they say the right to trial by jury is not one of those fundamental safeguards for the protection of the individual citizen, that was centemplated in the Bill of Rights. What more valuable institution have we as the fruit of the Anglo-Saxon struggle against tyranny during all the ages?

If the right to trial by jury is not a fundamental right that belongs to citizens of the United States, and that too of sufficient importance to claim and obtain a place under the protecting ægis of the Constitution of the United States, it would seem difficult indeed to discover a right that can claim that distinction. The verdict of a jury in the trial of the Seven Bishops, carried more consternation to the heart of James II of England, than the failure of any and all of his other measures of attempted lawlessness. That verdict was a new Declaration of Independence along the lines of Magna Charta, and ought to be hailed in every age as a new inspiration to the

people to keep alive an institution that has so many times been their last bulwark against a rising tyranny. When that same despicable tyrant heard the triumphant shout of the people on learning the verdict of that same jury he asked, "What is that?" "It is nothing," was the reply, "only the soldiers are glad that the Bishops are acquitted!" "Do you call that nothing?" grumbled the King. *He* saw in it death to his attempts to trample upon the rights of the people. And yet, in this opinion of the Supreme Court of Utah we are gravely informed, that notwithstanding one-third of the jury has been taken away from the plaintiff in error, he has suffered no diminution of his constitutional rights. Surely this opinion does not correctly state the law.

The Supreme Court of Utah said in the case of The State vs. Bates, 14 Utah 293, at page 301: "If a jury of eight men is as likely to ascertain the truth as 12, that number secures the end." Could not one man do as well? Is this argument not equivalent to saying that if one man is as likely to ascertain the truth as twelve, that he alone secures the end? Again, if the number of jurors may be changed, why may not the quality also? Why not say that the relatives of the injured party in any case shall be permitted to dis-

pose of the person and effects of the accused as they may deem proper? So long as every accused person is subjected to an equal degree of vengeance on the part of his victim's friends he is being disposed of by ~~one~~ due process of law as defined by the Supreme Court of Utah. By their definition equal injustice is as much due process of law, as equal justice. Equality and uniformity are the only requisites.

The Plaintiff in Error also says, THAT HE IS DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW. He claims that the words, "due process of law," had, at the time they were incorporated into the Fourteenth Amendment, a well understood and defined meaning. In no state of the Union at that time, could any person be deprived of life, liberty, or property, by *any State*, except after a trial and conviction by a jury, which jury was never composed of less than twelve persons.

The purpose of this Amendment in this particular seems to have been to throw around the individual a permanent protection against the consequences of hasty and ill-considered legislation, as well as against arbitrary acts of official violence. Judge Cooley, in his work on Constitutional Limitations, p. 356 (Star page,) says:

"The principles, then, upon which the process is based are to determine whether it is due process or not, and not any consideration of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.

"When the government through its established agencies interferes with the title of one's property or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before disposition; but when property is appropriated by the Government to public uses, or the legislature interferes to give direction to its title through remedial Statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means, such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

"*Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizens.*"

Can it be seriously contended, that a law of a state, which abolishes trial by jury in cases of felony, is a law "with due regard to the landmarks established for the protection of the citizen? If trial by jury be not a landmark established for the protection of the citizen, pray, what would be such a landmark?

"*Due process of law in each particular case means, such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.*"

We say that trial by jury was always prescribed in cases of felony, to which class the plaintiff's case unmistakably belongs. What more precious right have we than the right of trial by jury in cases involving the liberty of the citizen? What higher right could the Federal Constitution lend its aid to preserve? Of what use to us are all our other privileges, if this one, which marks the line between the Anglo-Saxon and the rest of

the world, is left unprotected against the assaults of the whims and caprices of a body of men who, without ever having studied the principles of liberty and freedom or the means of protecting the institutions of the country, for one single hour, are intrusted by the people with the powers of making statutes and constitutions? We can already hear the advocates of this monstrosity exclaim: "The people of the state can always be trusted to protect the rights of citizens?" Then why was the Fourteenth Amendment adopted? Every state is supposed to have one lucid interval in which it sits down deliberately to protect itself from itself by putting up barriers, which no sudden burst of passion in the people can over-ride. In Utah, they have torn up the barrier by the roots, and left the citizen clinging only to the solid foundations of liberty as they are found in the Federal Constitution, far removed from the influence of the inexperienced novice at Constitution-building. His trust in that refuge is on trial in this case. For if in the Constitution and laws of Utah only he has hope of safety, he is of all men most miserable. That flower has become ashes in his hand. That stay has been snapped in the first breeze of adversity. That hope that a man

ought to realize in relying on the State Constitution is turned to the deepest despair, and the light that ought to shine out like a beacon, has become the densest darkness, and he must find an anchor in the Constitution of the United States, or drop down into the abyss, crying as he falls, that after all, the loud sounding claim of Americans, that they are secure against chaos, is a lie.

The words "due process of law," were undoubtedly intended, said this Court, in Murray's Lessees vs. Hoboken, etc., 18 Howard, to convey the same meaning as the words "by law of the land," in Magna Charta.

In the case of Jones vs. Robbins, 8 Gray, 329, the Supreme Judicial Court of Massachusetts, in passing upon the question whether a statute, which gave a single magistrate authority to try an offense punishable by imprisonment, in the State Prison, without the presentment of a grand jury, violated that provision of the State Constitution which declared that "no man shall be arrested, imprisoned, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land," speaking by Chief Justice Shaw, said:

"This clause, in its whole structure, is so

manifestly conformable to the words of Magna Charta, that we are not to consider it as a newly invented phrase first used by the makers of our Constitution, but we are to look at it as the adoption of one of the great securities of private right, handed to us among the liberties and privileges which our ancestors enjoyed at the time of their emigration and claimed to hold and retain as their birthright.

"These terms in this connection, cannot, we think, be used in their most bald and literal sense to mean the law of the land at the time of their trial, because the laws may be shaped and altered by the legislature, from time to time; and such a provision, intended to prohibit the making of any law impairing the ancient rights and liberties of the subject, would under such a construction be wholly nugatory and void. The legislature might simply change the law by statute, and thus remove the land mark and the barrier intended to be set up by this provision in the Bill of Rights. It must, therefore, have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England before the settlement of this country, and the emigrants themselves and their descendents had found safety for their personal rights."

After showing that "law of the land," as used in Magna Charta and in the Constitution of Massachusetts, has the same meaning as "due process of law," and after stating that the people of the original States deemed it essential for the better security of their rights of life, liberty and proper-

ty, that their constitutions should set forth and declare the fundamental principles of free government, the opinion proceeds:

"Most of the state constitutions did contain these declarations, more or less detailed and explicit; but the general purpose was to assert and maintain the great rights of English subjects, as they had been maintained by the ancient law, and the actual enjoyment of civil rights under them. 'The sense of America was,' says Chancellor Kent, 'more fully ascertained, and more explicitly and more solemnly promulgated, in the memorable Declaration of Rights, of the first Continental Bill of Rights, in October, 1774, and which was a representation of all the states except Georgia. That declaration contained the assertion of several great and fundamental principles of American liberty, and it constituted the basis of those subsequent bills of rights which under various modifications, pervaded all our Constitutional Charters."

2 Kent, 5, 6.

The heresy that trial by jury is mere procedure as held by the Supreme Court of Utah in the case of the State vs. Bates 14 Utah 293, and in the State vs. Thompson, 15 Utah, 488, met its death blow in the decision of this Court in the case of

Thompson vs. Utah, 170 U. S., 343.

For an exhaustive discussion of the doctrine of "due process of law," I know no better article

than the dissenting opinion of Mr. Justice Harlan in the case of

Hurtado vs. California, 110, U. S. 538.

The contention of plaintiff in error is not for a mere shadow, but for a substantive right, that cannot be lightly disregarded. If trial by jury in cases of felony can be brushed away like cobwebs, nothing is safe. While the Supreme Court of Utah has laid to itself the flattering unction that it has preserved trial by jury because it has given eight jurors in lieu of twelve, it is the beginning of the end of all pretense of jury trial. Upon this phase of the question, I feel like quoting the words of Mr. Guthrie of the New York Bar, where he says:

"When a Constitutional right is invaded, we are not bound to stand silent so long as moderation is practiced. There can be no greater political blindness, no more dangerous policy, than to sanction the invasion of constitutional rights because the particular instance is in itself apparently harmless or seems expedient. Admit the wedge ever so little, and there is nothing to prevent its being driven home. We are not compelled to wait until the unconstitutional measure becomes ruinous confiscation or an intolerable interference with personal liberty. In respect of Constitutional guarantees we have a right to expect absolute security and protection, and the courts are under a duty to enforce the Constitutional provisions guar-

anteeing our rights wholly irrespective of the degree of their infringement. Present inconvenience, however great, present expediency however tempting, can never justify the slightest disregard of any provision of the Constitution. It is ever the moderate and light invasions of Constitutional rights, that are the most dangerous. As was said in a leading case: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to the gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.'

"*Mr. Justice Bradley in Boyd vs. United States, 116, U. S. 616, 635.*

"As to our Constitutional rights, eternal vigilance and uncompromising enforcement must be our rule of conduct if we are to preserve and perpetuate American Constitutional institutions. We should never tolerate any infringement of Constitutional rights, no matter how slight or trivial. Toleration of even insignificant violations of Con-

stitutional rights serves to weaken our sense of those rights."

Guthrie on Fourteenth Amendment, pp. 40, 41.

Section 4516, Revised Statutes of Utah, which went into effect January first, 1898, provides:

"No person shall be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the Court, or upon a plea of guilty, or upon a judgment against him upon a demurrer when he refuses to plead, or upon a judgment of a court for a public offense not amounting to a felony, a jury having been waived."

Section 4810. R. S., is as follows:

"Issues of fact must be tried by a jury, unless a trial by jury be waived in criminal cases not amounting to felony by the consent of both parties expressed in open court and entered on its minutes."

So that it cannot be claimed by the defendant in error that the plaintiff ever waived a trial by jury, since under the statutes he could not do so.

Cancemi vs. The People 18, N. Y., 128.

Territory of Montana vs. Ah Wah, 1 Pac. Rep. 732.

Thompson vs. Utah, 170, U. S. 343, 353.

We respectfully submit that the Supreme Court of Utah erred in denying plaintiff's contention that he is deprived of his liberty in violation

of the Constitution of the United States in the particulars hereinbefore set forth.

That Court erred in refusing to restore the plaintiff to his liberty, and in their said judgment they have plainly violated plaintiff's privileges and immunities as a citizen of the United States, by proceeding against him on a charge of robbery, otherwise than by presentment or indictment of a grand jury, and by trying and convicting him and imprisoning him on the verdict of eight persons instead of a jury, all of which is in violation of his rights as secured to him by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and that imprisoning him on the verdict of eight persons only instead of a jury, deprives him of his liberty without due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Wherefore, he prays that said judgment may be reversed and that he be restored to his liberty.

J. W. N. Whiteman

Attorney for Plaintiff in Error.